

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by:
Charles W. Avery
Dante M. Scaccia
James P. Shanahan
Syracuse, N.Y.

Estimated Time: 30 minutes

Docket No. 77-1491

In The
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

— v —

JAMES W. McGRATH, JON N. ENGLISH and RAYMOND
D. MASCIARELLI,

Appellants.

On Appeal From The United States District Court
For The Northern District of New York

**JOINT BRIEF FOR APPELLANTS,
McGrath, English and Masciarelli**

JAMES P. SHANAHAN
522 University Bldg.
Syracuse, New York 13202
Tel. (315) 422-4106
*Attorney for James W. McGrath,
Appellant*

CHARLES W. AVERY
133 Genesee Street
Auburn, New York 13021
Tel. (315) 253-0309
*Attorney for Jon N. English,
Appellant*

DANTE M. SCACCIA
Suite 300 Wilson Bldg.
Syracuse, New York 13202
Tel. (315) 422-4000
*Attorney for Raymond D.
Masciarelli, Appellant*

B
P/S

JAN 23 1978

TABLE OF CONTENTS

	Page
Table of Cases	ii
Preliminary Statement	1
Issues Presented	1
Statement of the Case	3
Arguments	3
I. The Appellants' Statutory and Constitutional Rights to a Speedy Trial were so Violated as to Require Dismissal of the Indictment.	8
II. Search Warrants were Issued on Stale Information and Without Probable Cause: Physical Evidence Seized Thereby Should be Suppressed	20
III. The Unreasonable and Unexplained Delays in the Sealing of the MP-15, MP-16 and MP-17 Tapes Mandate Suppression of all Conversations Seized	43
IV. The District Court Judge Should have Permitted the Playing of the Entire Tape of those Tapes Selected to be Played by the United States	50
Conclusion	54

TABLE OF CASES

	Page
<u>Aguilar -v- Texas</u> , 378 U.S. 108 (1964).	38
<u>Barker -v- Wingo</u> , 407 U.S. 514 (1972).	13, 14, 16,
<u>Durham -v- U.S.</u> , 403 F.2d 190 (9th Cir. 1968).	27
<u>Galloway -v- U.S.</u> , 319 U.S. 372.	53
<u>Giordenello -v- U.S.</u> , 357 U.S. 480 (1958).	37, 38
<u>Mapp -v- Warden</u> , 531 F.2d 1167 (2d Cir, 1976).	29
<u>Nathanson -v- U.S.</u> , 290 U.S. 41 (1933).	37, 38
<u>People -v- Hendricks</u> , 25 N.Y. 2d 129 (1969).	40
<u>Ex parte Peterson</u> , 253 U.S. 300.	53
<u>Sgro -v- U.S.</u> , 287 U.S. 206 (1932).. . . .	26, 27
<u>Spinelli -v- U.S.</u> , 393 U.S. 410 (1969).	40
<u>U.S. -v- Albergo</u> , 539 F.2d 860; <u>cert. denied</u> , 429 U.S. 1000.	52
<u>U.S. -v- Burke</u> , 517 F.2d 377 (2d Cir. 1975).	42
<u>U.S. -v- Carini</u> , 562 F.2d 151 (2d Cir. 1977).	12,14
<u>U.S. -v- Chiarizio</u> , 525 F.2d 294 (2d Cir. 1975),	53
<u>U.S. -v- Di Francesco</u> , 604 F.2d 769 (2d Cir. 1979).	8,13
<u>U.S. -v- Faruolo</u> , 506 F.2d 490 (2d Cir. 1974).	42
<u>U.S. -v- Gigante</u> , 538 F.2d 502 (2d Cir. 1976).	12, 42, 44, 45,46,47, and49
<u>U.S. -v- Harris</u> , 405 U.S. 573 (1971).	29
<u>U.S. -v- Neal</u> , 500 F.2d 305 (10th Cir. 1974).	27
<u>U.S. -v- New Buffalo Amusement Corp.</u> , 600 F.2d 368 (2d Cir. 1979).. . .	12,14
<u>U.S. -v- Pollak</u> , 474 F.2d 828 (2d Cir. 1973).	11

TABLE OF CASES (continued)

	Page
<u>U.S. -v- Ricco</u> , 566 F.2d 433 (2d Cir. 1977).	44,45,49
<u>U.S. -v- Robinson</u> , 544 F.2d 611 (2d Cir. 1976).	52
<u>U.S. -v- Sotomayor</u> , 592 F.2d 1219 (2d Cir. 1979; <u>cert. denied</u> , 47 <u>U.S.L.W.</u> 3786 (1979).	47
<u>U.S. -v- Ventresca</u> , 380 U.S. 102 (1965).	38,39
<u>U.S. -v- Vispi</u> , 545 F.2d 328 (2d Cir. 1976).	13

STATUTES

18 U.S.C. 1084	41
18 U.S.C. 2517(3)	44
18 U.S.C. 2518(8)(a)	43
18 U.S.C. 3161	8

RULES

F.R.Cr.P. 12(e)	47
-----------------------	----

JOINT BRIEF FOR APPELLANTS,
McGrath, English and Masciarelli

PRELIMINARY STATEMENT

The defendants appeal from decisions of the Honorable Howard G. Munson, United States District Judge for the Northern District of New York, rendered from the bench denying the motions of defendants Jon English, Raymond Masciarelli and James McGrath as follows:

(1) On November 26, 1976 and April 27, 1977, to dismiss indictment # 74 CR 142 on speedy trial grounds.

(2) On November 26, 1977, to suppress evidence seized pursuant to search warrants issued on the basis of stale information and without probable cause.

(3) On April 27, 1977, to suppress the Government's wiretap evidence on the ground of excessive sealing delay.

Defendant McGrath also appeals from adverse trial rulings.

ISSUES PRESENTED

(1) Whether the defendant's statutory and constitutional rights to a speedy trial were so violated as to require the sanction of dismissal of the indictment.

(2) Whether search warrants were issued on the basis of stale information and without probable cause so as to require suppression of physical evidence.

(3) Whether FBI delay in presenting tapes containing inter-

cepted telephone conversations for judicial sealing violated
Section 2518(8)(a) of 18 U.S.C.

(4) Whether the conviction of defendant James W. McGrath
should be reversed for error committed during trial.

STATEMENT OF THE CASE

The appellants and seven other defendants were charged with the conduct of an illegal gambling operation and conspiracy to conduct the same. (Indictment #74 CR 142, App. p. 1). The indictment was filed November 18, 1974 and the defendants were arraigned in the District Court for the Northern District of New York on December 10, 1974. Appellant Masciarelli was then and has been throughout this case represented by Attorney Dante M. Scaccia. Appellant McGrath was also represented by Attorney Scaccia at the arraignment and thereafter until November 16, 1976, at which time an unexpected conflict of interest required the assignment of Attorney James P. Shanahan. Appellant English was represented at the arraignment by Attorney Remo Allio; Attorney Charles W. Avery was assigned to represent him on February 4, 1976 and has continued to represent him ever since that date.

Subsequent to the entry of guilty pleas by some defendants and dismissal as to certain others, the defendant McGrath was severed and proceeded to trial. A conviction resulted from which he appeals. Defendants Masciarelli and English entered into a stipulation (App. p. 7) with the Government whereby they preserved their right to appeal pretrial rulings and entered guilty pleas to an information charging a violation of 18 U.S.C. 1084(a).

There follows a chronological sequence of the principal events affecting these appellants, occurring subsequent to the indictment.

(Dates refer to documents or to Court appearances, transcripts of which are a part of the record on appeal.)

1974

December 10. - Arraignment; motions ordered to be made returnable on January 13, 1975.

1975

January 13. - Motions for discovery, inspection and bills of particulars granted. The Government was directed to prepare the order and to provide the material requested within 10 days since the Government had noticed the case for call on January 31, 1975.

January 31. - Removed from the calendar because of Government's failure to complete discovery. Request that time not be charged to defendants was deferred to trial court.

March 4. - Government has not completed discovery. Defense request for time not to be charged to defendants referred to Judge Port, who was at that time designated as the trial judge.

March 10. - Discovery material still not furnished. No order yet prepared by Government. Chargeability of time to be held until trial.

March 11. - Verbal order of discovery of January 13 issued in writing by Judge Port.

April 14,

May 8,

May 13. - Government opposes so much of the order of discovery as requires it to furnish names of witnesses.

Appeal to Circuit Court of Appeals by Government. Stay of trial granted to 15 days after decision by Circuit Court.

May 15. - Order granting stay issued by Judge Port.

1976

March 8. - Order of this Court reversing District Court order filed with District Court Clerk.

March 24. - Order of Judge Port, on mandate of this Court, filed with District Court Clerk.

May 4. - Government admits that discovery, ordered on January 13, 1975 had not yet been completed.

Ordered completed by May 15.

Ordered ready for trial June 1.

May 5 - July 14.

1. Items of discovery information furnished piecemeal.
2. Motions for discovery, inspection and suppression.

May 24. - Return date for motions of discovery and inspection previously ordered and for suppression of wire tap evidence. Adjourned by Judge Port to trial judge to be assigned.

May 28. - Argument of motions for discovery, inspection and suppression. Evidentiary hearing started.

June 1. - Evidentiary hearing concluded. Decision reserved. Government admits that original search warrants and returns are missing.

June 29. - Motion made to suppress evidence seized by authority of missing search warrants. Motion to suppress wiretap evidence denied.

July 14. - Warrants found, motion withdrawn.

September 20. - Continued without date. Time excluded because of the illness of one counsel and because another was engaged in a murder trial.

November 9. - Continued to November 15 - Co-counsel unavailable.

November 15-16. - Conflict of interest between defendants Masciarelli and McGrath discovered so that separate attorneys were required. McGrath case severed and continued to December 20 with time excluded until then for McGrath. English-Masciarelli case continued ready.

November 17. - Motion for continuance by defendant English on the ground that not all of the previously ordered discovery has been provided by the Government.

Any additional motions must be made November 23 to be heard November 29.

November 29. - Motion for dismissal of indictment for speedy trial reasons argued and denied.

Motion for suppression of seized evidence argued and denied.

Motion for all wiretap transcripts argued and denied. Jury selection started.

November 30. - Mistrial because of juror misconduct.

Continued to February 14, 1977.

December 15-16. - Motion to suppress wire tapes because of sealing delay, argued. Hearing consented to by Government and ordered held commencing on January 3, 1977.

1977

January 3, 4, 7. - Suppression hearing. Adjourned to January 21 because of court congestion.

January 21. - Suppression hearing. Adjourned without date because of court congestion.

March 1. - Case marked "over" in "the interests of justice."

April 6. - Suppression hearing continued. Adjourned to April 11.

April 11. - Hearing concluded. Adjourned to April 27.

April 27. - Motions for speedy trial and suppression denied. McGrath trial commenced. Time to May 11 excluded for English and Masciarelli trial.

April 28. - McGrath trial continued.

McGrath mistrial because of insufficient jury panel.

May 3. - McGrath case set for trial.

May 11. - McGrath trial.

Masciarelli-English case to follow but no order of exclusion of time even though so indicated in Court docket.

May 13, 16, 17, 18, 19, 20. - McGrath trial continued.

May 24. - McGrath trial concluded. Jury verdict of guilty.

June 20. - McGrath sentence.

June 21. - Masciarelli and English trial commenced.

June 22. - Masciarelli and English plea on stipulation.

McGrath notice of appeal.

August 22. - Sentence of English and Masciarelli. Notice of appeal for both filed.

ARGUMENT

POINT I

THE APPELLANTS' STATUTORY AND CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL WERE SO VIOLATED AS TO REQUIRE DISMISSAL OF THE INDICTMENT.

The appellants were indicted on November 18, 1974, and arraigned on December 10, 1974. Trials were delayed until April 27, 1977 for appellant McGrath and until June 21, 1977 for appellants Masciarelli and English (following a mistrial on November 30, 1976). Furthermore, although the Government filed a Notice of Readiness for Trial on December 16, 1974, the Government was not actually ready for trial until June 30, 1976. On this date, it found the original search warrants, inventories and returns which had been lost since June, 1974. (Letters of AUSA Arthur A. Chalenski, Jr., to Attorney Charles W. Avery, dated June 22, June 25, and July 1, 1976, App. pp. 50, 52, 54). Appellants contend that this delay and lack of readiness violated the Speedy Trial Act, 18 U.S.C. § 3161-74 ("the Act"), the Northern District's Plan for Prompt Disposition of Criminal Cases ("the Plan"), and the Sixth Amendment's guarantee of a speedy trial.

The appellants recognize that the sanction of dismissal of the indictment for violations of the Act has been delayed until July 1, 1979 [United States v. DiFrancesco, 604 F.2d 769 (1979)]. It is also recognized that the Plan provides [Sec. 11(e)] that

failure to comply with the time limits prescribed therein shall not require dismissal of the prosecution, except where the Government is not ready for trial within six month [Sec. 11(c)].

However, the appellants urge that the delay in retrial of appellants Masciarelli and English constitutes a violation of the Act and the Plan, that the lack of readiness of the Government as to all appellants constitutes a violation of the Plan, and that dismissal of the indictment is required by the Plan and by the Sixth Amendment as to all appellants.

Appellants' computations of non-excludable times pursuant to the Act and the Plan are shown in tables (App. pp. 56-57). The total length of non-excludable time between indictment and trial as to each appellant is shown below:

	<u>Total Time</u>	<u>Excludable</u>	<u>Non-Excludable</u>
Masciarelli and English	695	375	320
McGrath	853	461	392

A. Readiness for Trial.

Although a Notice of Readiness for Trial was filed by the Government on December 18, 1974, appellants urge that the Government was, in fact, not ready for trial for the period from January 14, 1975 through June 30, 1976. On January 13, 1975, the Court ordered the Government to furnish items of discovery and inspection requested by the appellants and ordered the Government to prepare the order. (Transcript of Testimony, January 13, 1975, App. pp. 58). The Government failed to prepare the order or furnish the

discovery and inspection and eventually, on March 11, 1975, the Court prepared its own order. (Transcript of Testimony, March 11, 1975, App. pp. 62-72). Although the Government appealed part of the order and obtained a stay of trial until the decision of this Court, it failed to complete the ordered discovery until June 30, 1976, three months after the stay ended.

Evidence of the Government's lack of readiness is found in letters from attorneys for appellants to the District Court dated April 29 and April 30, 1976, (App. pp. 73-4) and in this excerpt of the transcript of testimony of May 4, 1976, a day on which appellants had been ordered to appear for call of the calendar (App. pp. 75-7)

" Mr. Chalinski: Your Honor, may I proceed first with this?

There have been applications for a continuance. If I might explain where we stand: The case was originally assigned to another attorney in our office, and then reassigned to me back last fall when the matter was up on appeal.

At the time of reassignment, the discovery orders had been granted in the case, and it was my understanding at that time, and substantiated, I must say, that discovery had been completed.

I became aware last Thursday that it had not, and I have made an effort to comply as far as possible.

As of this morning a Bill of Particulars requested has been dictated and I expect to have them out this afternoon. In matters that have not yet been furnished to defense counsel, who were on this case at the time of the original discovery order, a Bill of Particulars of the dates and places of the unlawful gambling activities, and exculpatory evidence, and the statements of the defendants, and everything besides that was offered to defense counsel at that time."

Thereafter, in piecemeal fashion, the required discovery was made. (Letters of AUSA Arthur A. Chalenski, Jr., dated May 5, 1976, May 12, 1976, May 20, 1976, June 22, 1976, June 25, 1976, June 30, 1976, July 1, 1976, App. pp. 78-83).

The Bills of Particulars furnished to the appellants are dated May 5, 1976. (App. pp. 85-6).

FBI laboratory reports, part of the discovery material ordered on January 13, 1975, were furnished in part on June 30, 1976 (App. pp. 82). The specimens were received at the laboratory on May 14, 1976 and tested on May 18, 1976, eighteen months after the Government filed its Notice of Readiness for Trial.

A copy of the original search warrants with inventory was first furnished to the appellants by letter dated July 1, 1976 (App. pp. 83-4), more than a year and a half after the Government filed its Notice of Readiness. During that entire eighteen month period, these original warrants and inventories, an indispensable part of the Government's case, had been lost. They were found on June 30, 1976. (Docket entry of that date.)

As a result of the obvious unreadiness of the Government for trial from January 13, 1975, to at least July 1, 1976, the Notice of Readiness filed December 18, 1974, and successive placement of this case on the calendar for call and trial, were meaningless. United States v. Pollak, 474 F.2d 828, 830 (2d Cir. 1973).

The lack of readiness was a violation of the Plan requiring readiness within six months of the indictment. In this case, the Government was not ready until after eighteen months.

Such a violation, not only mandates dismissal of the indictment [Plan rule 11(c)(e)] but also may be considered in assessing the merit of a constitutional speedy trial claim [United States v. New Buffalo Amusement Corp., 600 F.2d 368, 377 (2d Cir. 1979)], and, in fact, such a violation may "tip the scales" in appellant's favor where the balance is close. United States v. Carini, 562 F.2d 151-2 (2d Cir. 1979).

B. Retrial after Mistrial.

On November 30, 1976, as the jury was being drawn for the trial of Masciarelli and English, a mistrial was declared because of the misconduct of a juror.

A retrial was scheduled for February 14, 1977, appellants having consented to an exclusion of time until that date. In the meantime, a motion was made to suppress wiretap evidence for sealing delay, triggered by the recent decision of this Court in United States v. Gigante, 538 F.2d 502 (1976). The motion for a hearing was not opposed by the Government.

The hearing, commenced on January 3, 1977 was not completed until April 27, 1977. The delay was due only to the congestion in the Court and the pressure of other cases, and in no way due to the appellants. By the time of the retrial on June 21, 1977, 104 days of non-excludable time had expired, far more than the 60 days permitted by the Act and the Plan.

Dismissal of the indictment on this ground and on Sixth Amendment grounds was made on April 27, 1977. The merit of this claim is

treated hereafter in the discussion of "Second Speedy Trial Motion" (Post, p. 17).

FIRST SPEEDY TRIAL MOTION

The first of two speedy trial motions to dismiss the indictment was made on November 29, 1976. The argument is contained in the transcript of testimony of that day, pages 18-40 (App. pp. 91-113). The Court's decision from the bench is contained at pages 49-50 in the same transcript (App. pp. 117-118). In substance, the Court denied the motion on the ground that it was not timely made - even though it had been made before trial.

The controlling authority is Barker v. Wingo, 407 U.S. 514 (1972), in which the Court enunciated four factors which must be considered in evaluating a claim of a denial of the right to a speedy trial. These factors are:

1. The length of the delay.
2. The reason for the delay.
3. The defendants' assertion of his right.
4. The existence of prejudice to the defendant from the delay. Id. at 530.

Other relevant circumstances also may be considered in conducting a "difficult and sensitive balancing process", Id. at 533, "in which the conduct of both the prosecution and the defendant are weighed." Id. at 530. (See also United States v. DiFrancesco, 604 F.2d 769 (2d Cir. 1979); United States v. Vispi, 545

F.2d 328 (2d Cir. 1976); United States v. Carini,
supra.)

1. Length of the Delay

More than twenty-four months elapsed from the date of the indictment to the date of trial commencement, November 29, 1976. During at least eighteen of these months, and perhaps more (on November 17, 1976, it was admitted by the Government that a new expert witness had been assigned to the case and "he had been re-viewing the fact this week." Transcript of testimony November 17, 1976, page 18) the Government was not in fact ready for trial.

The Sixth Amendment guarantees that "(i)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

Where the delay is substantial, the burden is upon the Government to prove that the delay was justified and that appellants' speedy trial rights were not violated. United States v. New Buffalo Amusement Corp., 600 F.2d 368 at 377 (2d Cir. 1979).

The length of the delay, when substantial, must weigh heavily in support of appellants' claim that their rights have been violated. Such delay here should clearly "trigger" the constitutional analysis with respect to the other elements of the Barker test.

2. Reasons for the Delay

The reasons for the delay were varied, (defendants' computations of time, App. pp. 56-7). Approximately ten months were due to the Government's appeal to this Court of the order of District Court Judge Port's order directing the disclosure, inter alia, of the names and addresses of the Government's witnesses.

Substantially all of the balance of the delay has been due to the failure of the Government to furnish the discovery materials ordered by the District Court, the inspections of the physical evidence, the laboratory reports, the search warrants (which were lost for more than two years) and the continual motions by which defense counsel gradually obtained this material.

3. Defendants' Assertion of their Rights

At an early stage of this case, the Court and the Government were made aware of defense counsel's awareness of speedy trial computations. During the winter and spring of 1975, counsel for Masciarelli and McGrath repeatedly requested that time not be charged to the defendants while the Government was dilatory in obeying the Court's order of discovery and inspection. On January 31, 1975, March 4, 1975, and March 10, 1975 Attorney Dante M. Scaccia, specifically and at length requested that time not be charged to the defendants (transcripts 1/31/75, 3/4/75 and 3/10/75, App. pp. 120-142). In each case, the presiding judge referred the request to the trial judge, whoever that might be.

4. Prejudice to the Defendants

As pointed out in Barker v. Wingo, supra at p.533, the delay would unavoidably increase the "anxiety and concern" suffered by appellants as a result of the pending criminal indictment.

The complex nature of the charge involved over 1800 pages of wiretap transcripts, ten defendants, a charge that at least five locations were involved over an entire year of activity (June 1973 to June 1974) - a period more than 2 years before the first trial date. The nature of the charge of bookmaking required that 1800 pages of transcripts of telephone conversations be identified as those of various defendants and that the words of the conversations be interpreted as amounting to bookmaking, rather than gambling. Memories dim during the passage of time. The defense of each of the appellants was two-fold:

- (1) voice identification was faulty; and
- (2) the appellant was a gambler - not a bookmaker.

Accurate memory of the dates, times and places to be testified to by the prosecution witnesses was essential to a successful defense. The passage of time and the erosion of memory substantially prejudiced appellants.

Furthermore, the Government obtained an advantage by the delay: its experts had the advantage of their examination of the consolidated evidence of all wiretaps and all the transcripts of the tapes. At the time of trial in November 1976, the Government refused to allow the three appellants even one copy of all transcripts so that a defense expert on the jargon of bookmaking could examine the

entire structure. By dismissal, severance and plea, all but the three appellants had been eliminated from trial and by the time discovery had been substantially completed and trial was at hand, a consolidated defense was impossible.

SECOND SPEEDY TRIAL MOTION

The second speedy trial motion was made by all appellants on April 27, 1977. By letter of March 16, 1977, prior to making the motion, appellants had requested of the Clerk of the District Court a detailed computation of the time chargeable to each appellant, pursuant to the Plan, rule 10(b). (App. p. 143).

By letter of March 30, 1977, the Clerk informed appellants that the Clerk's office "cannot make such computations and that time is a judicial function only" (App. p. 144).

At the time of argument of the second speedy trial motion, appellants were handed by the Court what purported to be a computation of time as requested (App.p.145-a). Appellants disputed the accuracy of the computation, as will be pointed out below.

The second speedy trial followed a severance of the McGrath case and a mistrial in the Masciarelli and English case. Computations of time pursuant to the Act and the Plan have been made by the appellants, (App. pp. 56-57).

In addition to the Government's failure to be ready for trial

within 180 days of the filing of the indictment as a ground for dismissal of the indictment as to all appellants as a violation of the Plan and the Sixth Amendment, an additional violation of the Plan as to appellants Masciarelli and English had accrued by the time of the motion, April 27, 1977: Retrial after mistrial. [Plan Rule 5(b)]. Sixty-seven days of non-excludable time had expired by the time of the argument of the motion - the Plan required a retrial within 60 days. (Note: By the time of the retrial on June 21, 1977, 104 days of non-excludable time had expired.)

The Clerk's computation of time (App. p. 145-a) excluded the period from March 1, 1977 to May 3, 1977.

The case had improperly appeared on the Albany, New York calendar for call before District Judge Foley, while the suppression motion was still pending before Judge Munson. The Court's attention was directed to the fact that the case was improperly on the calendar. The continuation of the case to May 3 in Syracuse, New York "in the interest of justice" without the presence of any defendant or defendants' counsel was improper and could not exclude time from the operation of the speedy trial rule. (Transcript of March 1, 1977, App. p. 146-8).

As pointed out in oral argument on April 27, 1977, delay in continuation of the suppression hearing was due only to congestion in the courts and pressure of other cases, and not to the defendant-appellants.

The Court denied the motion as follows:

" MR. AVERY: There was a Speedy Trial motion, part of the motion.

THE COURT: All right, yes, I think you are correct, Mr. Avery, that is denied also.

First of all, I did take Mr. Shanahan's motion as having to do with the Constitutional ground as well as the Speedy Trial Act. It is denied on both grounds. All of you know that there have been quite a few delays in this case, two of them occasioned, I think, by mistrials. Is that correct or not?

MR. SCACCIA: One, Judge.

MR. AVERY: One only.

MR. SCACCIA: Two defendants involved in one mistrial.

THE COURT: All right, and the Court business in this district did delay it. It did delay the completion of the suppression hearing. It does not appear to me that the interests of justice have been hurt at all, either if you look at it from the Government's standpoint or the defendants' standpoint in this instance, and while I understand that every defendant is entitled under our Constitution to a speedy trial, I also understand that not all of them want it and that delay does not necessarily serve the interests of justice nor does speed. It would not appear to me that the defense or the prosecution has been at all hindered in the presentation of the case in this instance by whatever delays have been occasioned in this case."

Transcript of April 27, 1977, pp. 49-50, (App. pp. ____).

POINT II

SEARCH WARRANTS WERE ISSUED ON STALE
INFORMATION AND WITHOUT PROBABLE CAUSE:
PHYSICAL EVIDENCE SEIZED THEREBY SHOULD
BE SUPPRESSED.

FACTUAL BACKGROUND

On June 17, 1974, physical evidence was seized by agents of the Federal Bureau of Investigation pursuant to the purported authority of search warrants issued by the Hon. Edmund Port, U.S. District Judge, on June 17, 1974 at premises located at:

Room #4, Vestal Motel, Vestal Parkway East,
Vestal, New York;
229 Chenango Street, Binghamton, New York;
52 Rotary Avenue, Binghamton, New York;
820 Morelando Drive, Endicott, New York;
24 Lisle Street, Binghamton, New York.

All of the evidence sought to be suppressed was seized by Agents of the Federal Bureau of Investigation from the premises listed above pursuant to the purported authority of search warrants were based upon the affidavit of Robert R. Hazelwood, Special Agent, Federal Bureau of Investigation (App. pp.149-159), dated June 17, 1974.

The affidavit of Special Agent Robert R. Hazelwood sets forth that the alleged probable cause for the search warrant is

based upon the interception of various wire communications of certain telephones pursuant to orders authorizing such interception granted by the Hon. Edmund Port, United States District Judge, Northern District of New York, on March 6, 1974, April 11, 1974 and May 3, 1974. The respective interception periods were from March 7, 1974 to March 21, 1974; from April 11, 1974 and April 12, 1974, to April 25, 1974; and from May 4, 1974 and May 8, 1974 to May 13, 1974.

AS TO ROOM NO. 4, VESTAL MOTEL

It can be determined from the Hazelwood affidavit that at no time during the aforementioned periods was an order ever sought or obtained from Judge Port permitting the interception of wire communications upon any telephone located in Room No. 4 of the Vestal Motel, Vestal Parkway East, Vestal, New York.

Although the affidavit attempting to establish probable cause for the search warrant herein is quite lengthy, the only portions which relate to Room No. 4 of the Vestal Motel are contained on portions of page "4", "5" and "6" of Robert R. Hazelwood's affidavit. On page "4" of the affidavit, Special Agent Hazelwood alleges the conclusion that the various wire interceptions have revealed sundry individuals, including Jon English are bookmakers using telephone number 607-748-6084 and exchanging gambling information and laying off bets to other individuals. It is then alleged on page "6" of the affidavit that telephone number 607-748-6084 is located in Room No. 4 of the Vestal Motel.

Thereafter in paragraph "10" on page "5" of the search warrant affidavit, it is alleged that up to April 22, 1974, a total of thirty-eight calls were placed to telephone number 607-748-6084 from telephone number 607-729-1401. (This last number was one of the numbers wherein wire communications were being intercepted pursuant to the order of the Hon. Edmund Port.) It is then alleged in paragraph "10" of this affidavit that during the aforementioned calls, information was exchanged between Thomas Gaetani and three unknown males. Additionally "balances" were allegedly discussed.

Also in paragraph "10" Special Agent Hazelwood alleges that surveillances of Room No. 4 in the Vestal Motel by FBI Agents during the times of the wire interceptions have placed various parties on that location on different occasions including Jon N. English on at least four occasions. It is alleged that these surveillances were maintained up until May 13, 1974. But his affidavit also states "The times at which these observations took place coincide with the above described interceptions of gambling communications", which ended on April 22, 1974. Finally, Special Agent Hazelwood alleges in paragraph "10" that telephone number 607-748-6084 is subscribed to by John Spiga whom Special Agent Hazelwood claims has no postal, criminal or credit records.

The aforementioned Statement of Facts is the totality of information set forth in Special Agent Hazelwood's affidavit relating specifically to the probable cause for the search of Room No. 4 of the Vestal Motel on June 17, 1974.

AS TO PREMISES AT 229 CHENANGO STREET

An order was obtained from Judge Port permitting the interception of wire communication from a telephone located at premises known as Bottom Floor, 229 Chenango Street, Binghamton, New York, the telephone number being 607-724-5301.

Although the affidavit attempting to establish probable cause for the search warrant herein is quite lengthy, the only portions which relate to 229 Chenango Street, Binghamton, are contained on portions of pages "4", "6" and "7" of Robert R. Hazelwood's affidavit. On Page "4", of the affidavit, Special Agent Hazelwood alleges the conclusion that the various wire interceptions have revealed sundry individuals, including Ray Masciarelli and James McGrath are bookmakers using telephone number 607-724-5301 and exchanging gambling information and laying off bets to other individuals. It is then alleged on page "6" of the affidavit that telephone number 607-724-5301 is located on the first floor of 229 Chenango Street, Binghamton, New York.

Thereafter, in paragraph "11" on page "6" of the search warrant affidavit, it is alleged that up to April 25, 1974, numerous telephone calls were placed to telephone number 607-724-5301 from telephone number 607-729-1401. (This last number was one of the numbers wherein wire communications were being intercepted pursuant to the order of the Hon. Edmund Port.) It is then alleged in paragraph "11" of this affidavit that during the aforementioned calls information was exchanged between Thomas A. Gaetani, Raymond Masciarelli and James McGrath. Additionally "balances" were

allegedly discussed.

It is alleged in paragraph "12" of the affidavit that during the period of interception of communications from telephone number 607-724-5301 up to April 25, 1974, Raymond Masciarelli and James McGrath were intercepted in conversations to "various persons" including Thomas A. Gaetani.

Finally Special Agent Hazelwood alleges in Paragraph "11", that telephone number 607-724-5301 is subscribed to by Raymond Fornia whom Special Agent Hazelwood claims has no postal, credit or criminal record.

The aforementioned Statement of Facts is the totality of information set forth in Special Agent Hazelwood's affidavit relating specifically to the probable cause for the search of 229 Chenango Street, Binghamton, New York.

AS TO PREMISES AT:

52 Rotary Avenue, Binghamton;
820 Morelando Drive, Endicott; and
24 Lisle Street, Binghamton, N.Y.

The affidavit attempting to establish probable cause for the search warrants for the above named premises is quite lengthy but the salient information concerning each of the buildings is separated in the affidavit under headings relating to each. Gambling activity was intercepted concerning these premises as shown on the following table:

<u>PREMISES</u>	<u>DATE OF LAST INTERCEPTION OR OBSERVATION</u>
52 Rotary Avenue, Binghamton, New York	May 13, 1974
820 Morelando Drive, Endicott, New York	May 13, 1974
24 Lisle Street, Binghamton, New York.	April 25, 1974.

A.

PROBABLE CAUSE FOR THE ISSUANCE
OF THE SEARCH WARRANT DID NOT
EXIST BECAUSE THE ALLEGATIONS
SUPPORTING PROBABLE CAUSE WERE
STALE.

AS TO ROOM NO. 4 OF THE VESTAL MOTEL AND 229 CHENANGO STREET

The affidavit of Special Agent Robert R. Hazelwood alleges that intercepted telephone calls to numbers 607-748-6084 at Room No. 4, Vestal Motel, and 607-724-5301 at 229 Chenango Street, contained prohibited activity only up to and including April 22, and April 24, 1974, respectively. It is relevant to bear in mind at this point that the search warrant herein was granted on June 17, 1974. It then appears from the information set forth in the affidavit that any alleged prohibited activities at Room No. 4 of the Vestal Motel using telephone number 607-748-6084, and 229 Chenango Street using telephone number 607-724-5301, either terminated, or Special Agent Hazelwood has no further information relating to

these locations. It is submitted that the information set forth in Special Agent Hazelwood's affidavit cannot form the basis of search warrants for Room No. 4 of the Vestal Motel or 229 Chenango Street, for it is stale information relating to alleged illegal activity occurring approximately 52-55 days prior to the issuance of the search warrant.

The leading Supreme Court case in this area is Sgro v. United States, 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260 (1932), wherein the Court was confronted by a situation involving a delay of 21 days between the alleged probable cause and the issuance of the warrant. This case involved a specific Federal statute and the re-issuance of a warrant thereunder, but the Court in its decision spoke broadly and based its reasoning upon Fourth Amendment grounds. The Supreme Court in Sgro made it abundantly clear that the facts tending to establish probable cause for a search must be of a recent vintage when it stated:

The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual . . . while the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Id., at 210, 211.

The Court further stated that "the commissioner has no authority to rely on affidavits which have sole relation to a different time and have not been brought down to date or supplemented

7

so that they can be deemed to disclose grounds existing when the new warrant is issued." *Id.*, at 211. Applying the aforementioned principles the Supreme Court in Sgro found that the warrant therein could not be sustained because of the substantial delay involved.

The principles set forth in Sgro v. United States have been cited repeatedly in various cases and it can be safely stated that a delay of 54 days between the alleged existence of probable cause and the issuance of the search warrant would necessitate a Court voiding the search warrant due to the lack of probable cause.

United States v. Neal, 500 F.2d 305, 209 (Tenth Cir., 1974); and Durham v. United States, 403 F.2d 190 (Ninth Cir., 1968), also see footnotes cited therein; Annot., 100 ALR 2d 525 (1965). In United States v. Neal, the Court found insufficient probable cause where the delay involved was approximately three months and went on to state:

A more difficult question arises as to the sufficiency of the showing to the Magistrate to support a finding that there was probable cause to believe that a crime was being committed on the premises to be searched at the time of the filing of the affidavit. We are convinced that the remoteness of the information relied upon is such that it will not support the issuance of a valid warrant. The Fourth Amendment contemplates that probable cause for the issuance of the search warrant must exist at the time the search is sought to be made. Probable cause existing at sometime in the past will not suffice unless circumstances exist from which it may be inferred that the grounds continue to the time the affidavit was filed. 500 F.2d at 309.

The affidavit of Special Agent Hazelwood itself lends support to the position that any alleged probable cause for the issuance of the search warrants for these premises had ceased to exist as of the date of the issuance of the warrant on June 17, 1974. From the affidavit it can be gleaned that there was a cessation of alleged activity at both Room No. 4, Vestal Motel and 229 Chenango Street, since in fact there was an order for the interception of wire communications in existence for the same telephone numbers from May 4, 1974 through May 13, 1974. There is no indication whatsoever in Special Agent Hazelwood's affidavit that any alleged incriminating telephone calls were intercepted at either Room No. 4, Vestal Motel or 229 Chenango Street, during this period of time, and one can therefore logically conclude that any alleged illegal activity taking place at these locations had ceased as of April 22-25, 1974.

As to the cessation of reported criminal activity at the other locations, viz.:

52 Rotary Avenue, Binghamton, New York;
820 Morelando Drive, Endicott, New York; and
24 Lisle Street, Binghamton, New York,

dates are shown in the statement of facts as to each location.

In summary as to these locations, no criminal activity was reported at any of these locations after May 13, 1974, a period of thirty-five days prior to the issuance of the search warrants for these locations. One can logically conclude from all of the above, that if criminal activity continued at any of the locations for which search warrants were obtained, it would have been noted

or observed and therefore reported in the June 17th affidavit seeking the search warrants. Since no such activity was reported, one could have logically concluded that the alleged criminal activity taking place at all of these locations for which search warrants were obtained had ceased as of the dates indicated and did not exist on June 17, 1974, when the search warrants were issued.

The Government in its response to this motion and the Court in its decision from the bench (Transcript of November 29, 1976, App. pp. 160-161) referred to paragraph 20 of Agent Hazelwood's affidavit in which he states:

"These two sources (informants) . . . have indicated to me that this gambling business has been conducted since June 1973, and as of June 11, 1974 is still being conducted. Therefore I submit there is probable cause to believe that this illegal gambling business is still in operation."

While informant information may provide an adequate basis for a search warrant [United States v. Harris, 403 U.S. 573, 91 S. Ct. 2075 (1971)] such information should be factual and specific - not simply conclusory. The latest telephone intercepts at any location made May 13, 1974 and the latest surveillance observations made April 24, 1974 are contradictory, not supplementary, to the alleged informant conclusions.

The lack of continued observation or other method of detection of criminal activity from April 25 (or May 13) to June 17, clearly distinguishes this factual situation from that in Mapp v. Warden, New York Correctional Institute, 531 F.2d 1167 (2d Cir. 1976).

B.

PROBABLE CAUSE IS NOT ESTABLISHED BY THE HAZELWOOD
AFFIDAVIT SINCE IT IS CONCLUSORY AND FURTHER FAILS
TO SET FORTH SUFFICIENT DETAIL.

AS TO ROOM 4 OF THE VESTAL MOTEL

Special Agent Hazelwood in his affidavit at Paragraph "10" merely asserts the bare conclusion that, "during these calls point information was exchanged between Thomas A. Gaetani and at least three unknown males and layoffs or wagers were placed by the unknown males and Gaetani. Additionally, balances were discussed", but does not set forth the details of the telephone conversations from which the aforementioned conclusion is drawn. It is submitted that only through the disclosure of the content of the calls can an independent judicial authority determine whether or not probable cause exists for the issuance of a search warrant as is required by the Fourth Amendment of the United States Constitution.

Also with regard to the aforementioned telephone calls mentioned in Special Agent Hazelwood's affidavit, there is a complete lack of information as to the specific dates, times, places and occurrences of these alleged telephone calls. One is left to speculate as to when the alleged transactions and telephone conversations took place and how often they took place. It is significant at this point to recall that the interception of wire communications herein dated back to March 1974, a period of over three months prior to the issuance of the search warrant.

Proceeding further with Special Agent Hazelwood's affidavit one is advised by it that a total of thirty-eight calls were placed to telephone number 607-748-6084, but one is not advised as to which of the calls pertain to alleged illegal activity and which pertain to purely innocent conduct. Furthermore, one is again confronted with additional generalities and vagueness when in this instance Special Agent Hazelwood does not even specify when the alleged thirty-eight calls were made to telephone number 607-748-6084.

Although the Hazelwood affidavit sets forth a physical surveillance by the Federal Bureau of Investigation of Room No. 4 Vestal Motel, these physical surveillances did in establishing probable cause since they are not specific. fail to set forth when the individuals were seen at the premises, how long the individuals were at the premises. Special Agent Hazelwood claims that the surveillances were in effect as late as May 13, 1974. However, in the last sentence of paragraph "10" of this affidavit, Special Agent Hazelwood claims that the physical surveillances and observations coincided "with the above described interceptions of gambling communications". If this in fact is true, then the last physical surveillance of any of these individuals at the premises must have taken place up to April 22, 1974, since it is claimed that the April 22, 1974 date is the last date wherein telephone calls were placed to telephone number 607-748-6084 at Room No. 4 in the Vestal Motel. This conclusion is drawn from the statement set forth in the first sentence of paragraph "10" of the affidavit herein.

AS TO 229 CHENANGO STREET

Special Agent Hazelwood in his affidavit at Paragraph "11" merely asserts the bare conclusion that, "during these interceptions McGrath and Masciarelli conducted their transactions over telephone number 607-724-5301 as determined by outgoing calls from 607-724-5301". The affidavit also states, "on several occasion during the period of these interceptions Raymond Masciarelli responded to telephone calls to "R.F.". Paragraph "12" of his affidavit Special Agent Hazelwood in referring to interception of communications over telephone number 607-724-5301 stated that Raymond Masciarelli and James McGrath were intercepted on numerous occasions providing point information to various persons, accepting wagers on horse races, basketball and baseball, discussing balances of bets or like offers with numerous persons including Thomas E. Gaetani. All of these communications were stated to have been on or prior to April 25, 1974. None of the conversations referred to in Paragraph "11" or "12" of the affidavit set forth the details of the telephone conversations from which the aforementioned conclusions were drawn. It is submitted that only through the disclosure of the content of the calls can an independent judicial authority determine whether or not probable cause exists for the issuance of a search warrant as is required by the Fourth Amendment of the United States Constitution.

Also with regard to the aforementioned telephone calls mentioned in Special Agent Hazelwood's affidavit, there is a complete

lack of information as to the specific dates, times, places and occurrences of these alleged telephone calls. One is left to speculate as to when the alleged transactions and telephone conversations took place and how often they took place. It is significant at this point to recall that the interception of wire communications herein dated back to March 7, 1974, a period of over three months prior to the issuance of the search warrant.

AS TO 820 MORELANDO DRIVE, ENDICOTT

Special Agent Hazelwood in his affidavit in Paragraph "13" merely asserts the bare conclusion that, "Thomas A. Gaetani. . . provided point information on basketball and baseball events and

(2). received lay-off of wagers from Roger and Joyce Evanek" and ". . . receiving point information from Thomas Gaetani providing that information to numerous persons, accepting wagers, and layoff of wagers from various persons, and laying off to Thomas A. Gaetani". No details of any of the telephone conversations referred to above were set forth from which the aforementioned conclusions are drawn. Again, it is submitted that only through the disclosure of the contents of the calls can an independent judicial authority determine whether or not probable cause exists for the issuance of a search warrant as is required by the Fourth Amendment of the United States Constitution.

AS TO 24 LISLE STREET, BINGHAMTON

Special Agent Hazelwood in his affidavit at Page "15" merely asserts the bare conclusion that Carmen C. DeLanzo was intercepted while discussing with Thomas A. Gaetani bookmaking, laying off of sports, wagers, and point information. . ." and as late as April 25, 1974, DeLanzo was intercepted while discussing with Raymond Masciarelli and James McGrath point information and financial status of an illegal gambling operation. Agent Hazelwood added that DeLanzo spoke over telephone number 607-724-1622 and that the subscriber of that number is Edward Glover and that the phone was located in the basement apartment at 24 Lisle Street, Binghamton, New York. No interception order was obtained for this telephone number.

No details of the telephone conversations of DeLanzo were set forth from which the conclusions were drawn.

Again it is submitted that only through the disclosure of the content of the calls can an independent judicial authority determine whether or not probable cause exists for the issuance of a search warrant as is required by the Fourth Amendment of the United States Constitution.

Also with regard to the aforementioned telephone calls mentioned in Special Agent Hazelwood's affidavit, there is a complete lack of information as to the specific dates, times, places and occurrences of these alleged telephone calls. One is left to speculate as to when the alleged transactions and telephone conver-

sations took place and how often they took place. It is significant at this point to recall that the interception of wire communications herein dated back to March 7, 1974, a period of over three months prior to the issuance of the search warrant.

AS TO 52 ROTARY AVENUE, BINGHAMTON

Special Agent Hazelwood in his affidavit in Paragraphs "7" and "8" asserted the conclusion that Rappucci and Gaetani were taking "horse, basketball and baseball wagers accepting layoff of bets, exchanging point information and race results, and conferring with various persons regarding illegal gambling business". The period of time during which such asserted activity about which the conclusion was made took place was "as late as April 25, 1974." The telephone number alleged to have been utilized during this period was 607-729-1401, located at 52 Rotary Avenue, Binghamton, one of the locations for which search warrants were requested on June 17, 1974.

In Paragraph "8" of his affidavit, Special Agent Hazelwood again concluded that Rappucci and Gaetani on several occasions were "discussing the wagers and lay-off balances of bookmakers and bettors doing business with them in their illegal gambling business".

One of the telephone numbers and locations referred to in this conclusory paragraph was 607-729-1401 located at 52 Rotary

Avenue, Binghamton.

In Paragraph "9" of his affidavit Agent Hazelwood concluded that Roger and Joyce Evanek received "the point spread on baseball games from", and laid "wagers off to Thomas A. Gaetani at number 607-729-1401". No details of any telephone conversation is set forth to indicate the basis for the conclusions set forth in these three paragraphs. It is submitted that only through the disclosure of the content of the calls can an independent, judicial authority determine whether or not probable cause exists for the issuance of a search warrant as is required by the Fourth Amendment of the United States Constitution.

Also, with regard to the aforementioned telephone calls mentioned in Special Agent Hazelwood's affidavit, there is a complete lack of information as to the specific dates, times, places and occurrences of these alleged telephone calls. One is left to speculate as to when the alleged transactions and telephone conversations took place and how often they took place. It is significant at this point to recall that the interception of wire communications herein dated back to March 1974, a period of over three months prior to the issuance of the search warrant.

In determining whether probable cause exists for the issuance of a search warrant, the United States Constitution does not permit speculation but rather requires specific factual basis to support probable cause. The affidavit supporting the issuance of a search warrant must particularly and specifically describe the alleged illegal activity by setting forth specific dates, times,

places and occurrences. A continuous line of U.S. Supreme Court cases have supported the proposition that search warrants must be based upon detailed facts and circumstances in order to support probable cause.

In Nathanson v. United States, 290 U.S. 41, 78 L. Ed. 159, 54 S. Ct. 11, the United States Supreme Court held that "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough". Id., at 47, 78 L. Ed. at 162.

Similarly, the Supreme Court in Giordenello v. United States, 357 U.S. 480, 2 L.Ed. 2d 1503, 78 S. Ct. 1245, following the holding of Nathanson stated:

That the inferences from the facts which lead to the complaint must be drawn by a neutral and detached Magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . The purpose of the complaint, then, is to enable the appropriate Magistrate. . . to determine whether the 'probable cause' required to support a warrant exists. The commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion. Id., at 486, to 2 L. Ed. 2d at 1509.

It becomes apparent from the holdings of the foregoing cases that in order for a Magistrate to determine whether or not probable cause exists for a search warrant he must be furnished with suffi-

cient facts and details to make that determination. An affidavit which sets forth conclusions of the police officer and also lack details as to specific times, places, dates and occurrences does not give a Magistrate or an independent judicial authority sufficient material in order to make a determination of probable cause. The affidavit in the present case is fraught with the aforementioned infirmities and therefore it fails to establish probable cause for the search of Room No. 4, Vestal Motel, or the four other searched locations.

Following the principles set forth in Nathanson and Giordenello the United States Supreme Court in Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, stated that the inferences from the facts which lead to a complaint must be drawn by a neutral and detached Magistrate and not by the police officer involved. The Court further emphasized that the Magistrate himself must determine the persuasiveness of the facts relied upon to show probable cause. A Magistrate is unable to determine the persuasiveness of the facts of an affidavit when, as in the affidavit herein, the affiant police officer sets forth his conclusions in attempting to establish probable cause and further fails to set forth the specifics, i.e. date, time, place and duration, of the circumstances surrounding the alleged illegal activity.

One of the more illuminating decisions in this area is the United States Supreme Court case of United States v. Ventresca, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741, wherein the Court

in upholding the search warrant there set forth important guide lines to be followed in determining the adequacy of an affidavit supporting probable cause for a search warrant.

This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. . . . Recital of some of the underlying circumstances in the affidavit is essential if the Magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where the circumstances are detailed, where reason for crediting the source of the information is given, and when a Magistrate has found probable cause, the Courts should not invalidate the warrant by interpreting the affidavit in hypertechnical, rather than common sense manner. Id., at 108, 109, 13 L. Ed. 2d at 689.

It is important to read the language of this decision in light of the affidavit of that case which is set forth in the appendix to the decision. In applying the principles set forth in its decision the Supreme Court in Ventresca upholds the search warrant and the affidavit supporting it, which is a detailed document with copious references to dates, times and places of alleged criminal activity supporting probable cause. In comparing the Ventresca affidavit with the affidavit in the case at bar, it is submitted that the affidavit of Special Agent Hazelwood lacks sufficient detail of the circumstances involved and therefore fails to meet the standards set forth in United States v. Ventresca and consequently fails to establish probable cause for the search of Room No. 4, Vestal Motel or any of the other four locations for which search warrants were

issued. See also, People v. Hendricks, 25 N.Y. 2d 129, at 136, 137, 303 N.Y.S. 2d 33 at 39.

Finally, in evaluating the quality of information supplied by Special Agent Hazelwood's affidavit, particularly relating to the physical surveillances, one should consult the Supreme Court case of Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584. Like the affidavit of the Spinelli case, the present affidavit, regarding the physical surveillances, merely sets forth conduct which on the face of it is purely innocent. In discussing the type of physical activity that is set forth in Special Agent Hazelwood's affidavit the Supreme Court in Spinelli stated that these activities "contain no suggestion of criminal conduct when taken by themselves." Id., at 418, 21 L. Ed. 2d at 645. It is therefore submitted that the physical surveillances enumerated in Special Agent Hazelwood's affidavit relating to Room No. 4, Vestal Motel or 229 Chenango Street cannot be used to aid in forming the basis of probable cause to search those premises.

PROCEDURAL BACKGROUND

The defendants appeal from a decision of the Honorable Howard G. Munson, United States District Judge, rendered from the bench in the United States District Court for the Northern District of New York on April 27, 1977, denying the motions of Jon English, Raymond Masciarelli and James McGrath to suppress the Government's wiretap evidence.

Two indictments, 74 Cr. 142 and 74 Cr. 144, filed November 18,

1974, charged twelve defendants originally involved in this appeal. One indictment contained three counts charging eleven persons. Ten of those persons were charged in count one with conducting an illegal gambling business in violation of 18 U.S.C. §§ 2 and 1955 and in count two with conspiring to conduct such a business in violation of 18 U.S.C. § 371. The third count of the first indictment charged one of the ten and an eleventh with obstruction of justice by beating a grand jury witness in violation of 18 U.S.C. §§ 2 and 1503. The second indictment charged one of the defendants charged in the first indictment and a twelfth with unlawful use of interstate wire communication facilities in the business of betting, in violation of 18 U.S.C. §§ 2 and 1084(a). The four counts included in the two indictments had been ordered apportioned among three trials: a trial of the first two counts of the first indictment, a trial of the third count of the first indictment, and a trial of the single count of the second indictment. Subsequent to the entry of guilty pleas by some defendants and dismissal as to certain others, the defendant McGrath was severed from the indictment involving the defendants English and Masciarelli and proceeded to trial resulting in a conviction from which he appeals. The defendants English and Masciarelli entered into a stipulation with the Government whereby they preserved their right to appeal pretrial rulings and entered guilty pleas to an information charging a violation of T. 18 U.S.C. § 1084.

In November and December, 1976, the appellees filed motions to

suppress the Government's wiretap evidence on various grounds, including the Government's failure to comply with the sealing provisions of Title 18, United States Code, Section 2518(8)(a).

Following several days of evidentiary hearings held between January 3, 1977 and April 27, 1977, Judge Munson denied the motions for suppression. Although Judge Munson stated that a written opinion would follow the decision rendered from the bench, none has been furnished.

The sole question in this point is whether the District Court erred in denying the motions of appellants to suppress conversations intercepted in the course of court-ordered wiretaps.¹

The Government should concede both that there is no explanation for the three delays and that under the appropriate case law, see United States v. Gigante, 538 F.2d 502 (2d Cir. 1976), the wiretap tapes would be suppressed at trial or in a grand jury proceeding.

1. A defendant may appeal the denial of a suppression motion after he pleads guilty, where, as here, the government consents to this procedure at the time of the plea. See United States v. Burke, 517 F.2d 377 (2d Cir. 1975); United States v. Faruolo, 506 F.2d 490, 491, n.2 (2d Cir. 1974).

POINT III

THE UNREASONABLE AND UNEXPLAINED DELAYS IN THE SEALING OF THE MP-15, MP-16 AND MP-17 TAPES MANDATE SUP- PRESSION OF ALL CONVERSATIONS SEIZED

Appellants contend that the government should not have been permitted to rely on any of the tapes recorded during the interceptions described above because unacceptable delays preceded the judicial sealing of these tapes.

The federal wiretap statute requires the "immediate" judicial sealing of tapes recorded in the course of a wiretap, and under the terms of the statute the admissibility of such tapes into evidence is conditioned upon the presence of a judicial seal or the offer of a satisfactory explanation for its absence.² Federal courts have interpreted such provisions to require, by implication, a satisfactory explanation even when a judicial seal is present, if such seal was not obtained "immediately." See, e.g., United States v.

2. Section 2518(8)(a) of 18 U.S.C. provides in part: immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. . . Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of Section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or

Ricco, 566 F.2d 433, 435 (2d Cir. 1977), cert. denied, 436 U.S. 926 (1978); United States v. Gigante, 438 F.2d 502, 506 (2d Cir. 1976). This Court has had occasion before to discuss the importance of the sealing provisions of the federal act.

Congress, in enacting Title III's sharply detailed restrictions on electronic surveillance intended to "ensure careful judicial scrutiny throughout" the process of intercepting and utilization of such evidence. . . .

The immediate sealing and storage of recordings of intercepted conversations, under the supervision of a judge, is an integral part of this statutory scheme. Section 2518(8)(a) was intended to "insure that accurate records will be kept of intercepted communications". . . . Clearly, all of the carefully planned strictures on the conduct of electronic surveillance . . . would be unavailing if no reliable records existed of the conversations which were, in fact, overheard.

evidence derived therefrom under subsection (3) of Section 2517. Section 2517(3) of 18 U.S.C. provides:

Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication for such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

United States v. Gigante, supra, 538 F.2d at 505 (citations omitted). Gigante held that where tapes had not been properly sealed, suppression is appropriate even in the absence of any showing that the tapes had been altered. The Court reasoned that to condition suppression of improperly sealed tapes on a showing of tampering would controvert the language of the statute and would vitiate the Congressional purpose.

This provision is far more than a technicality. "The immediate sealing and storage of recordings of intercepted conversations, under the supervision of a judge, is an integral part of [Title III]," and is to be strictly construed. United States v. Gigante, 538 F.2d 502, 505 (2d Cir. 1976); United States v. Ricco, 421 F. Supp. 401 (S.D.N.Y. 1976). Here, the Government's failure to adhere to the sealing requirement mandates suppression of all conversations intercepted by means of orders MP-15, MP-16 and MP-17.

The record shows the following delays in sealing:

<u>Order</u>	<u>Date</u>	<u>Expired</u>	<u>Sealing</u>	<u>Delay</u>
MP-15	Mar. 6, 1974	Mar. 21, 1974	Mar. 25, 1974	4
MP-16	Apr. 11, 1974	Apr. 26, 1974	May 3, 1974	8
MP-17	May 3, 1974	May 18, 1974	May 21, 1974	3

The sealing of the MP-15, MP-16 and MP-17 tapes -- from three to eight days tardy -- was clearly not "immediate." That term was defined most recently by Judge Lasker in United States v. Ricco, supra, 421 F. Supp. at 410, to require,

. . . that law enforcement officers must be provided reasonable resources which must be used with reasonable dispatch to the end that the tapes are sealed as soon after the taps end as is possible in such circumstances.

Here, there was simply no question that the Assistant U.S. Attorney and the F.B.I. agents in fact had the ability to present the tapes for sealing on the date the order expired, or at least on the following day. Nevertheless, the Government waited, in one case more than a week, to present the tapes for sealing.

Not only were the tapes not sealed immediately, but no "satisfactory explanation" was tendered for these delays. The Government never disputed that the delays in sealing the tapes were a result of a decision to transport the tapes from Binghamton, New York, where the interception occurred, to Albany, New York, where the duplicate tapes and transcripts and storage occurred, before delivery to Auburn, New York for presentation to Judge Port. Accordingly, since the sealing was not immediate, and since there was no satisfactory explanation for the delay, suppression is required. United States v. Gigante, supra.

Judge Munson's decision denying suppression was totally unexplained. The district court merely held that "the Court has not rendered an opinion as yet . . . and at this time I am going to deny the motion for suppression and a written opinion will follow." (A.162

April 27, 1977, p.3; emphasis added.)* We submit that this conclusion must be rejected. First, there is nothing in the ruling to indicate that the Government had complied with the statutory post-authorization requirements. Moreover, the Government itself did not take the position that they had immediately made the recordings available to the issuing judge. The issue is whether the Government has complied with the statute.

The law is clear that if no explanation has been offered for these delays, the court is obliged to reverse, as a sealing achieved three to eight days after expiration of a wiretap cannot be considered "immediate." Cf. United States v. Gigante, supra, 538 F.2d 502 (8 to 12 month delays).

The cases illustrate that sealing is often possible within one or two days. See, e.g., United States v. Sotomayor, 592 F.2d 1219 at 1221 (2d Cir.), cert. denied, 47 U.S.L.W. 3786 (U.S. June 14, 1979). Thus, in our view, any delay beyond that certainly calls for explanation. Unfortunately, there is no clear consensus as to what constitutes a "satisfactory explanation," under the statute, for a less-than-immediate sealing.

No affidavit was submitted by the government at the suppression hearing, although there was testimony of some of the agents regarding the carrying out of portions of the wiretapping. The agents did not experience shortages in either qualified personnel

* F.R.Cr.P. Rule 12(e) requiring the court to state its essential findings on the record has not been complied with in this case.

or equipment. Surveillance on each wire was conducted each day and as many as three lines were monitored at any given time. No attempt was made to record both original tapes and duplicate tapes simultaneously. No duplicates had been made during the interception itself. Each application for continued authorization of a tap contained information obtained during the effective period of the prior order or extension so that the issuing judge would have sufficient information on which to base a determination that continued surveillance was justified. This on-going evaluation of the conversations intercepted made no further demands on the personnel and equipment available. Finally, the fact that only 63 reels of tape required duplicating, labeling, and checking, the prompt preparation of the tapes for sealing was not therefore made difficult.

The question is not close, in our view. The circumstances just detailed provide no satisfactory explanation for the three to eight day sealing delays. When the wiretaps were first instituted, the government had reason to believe that the investigation would be quickly concluded. The evidence needed had been gathered during the first week or two of surveillance. Personnel and equipment on which the project depended should have been able to handle the necessary monitoring, duplication and transcription without incurring delays in sealing. In the circumstances of this case, where we discern on the government's part, lack of diligence, we believe that the government's lack of foresight regarding the sealing delays justifies the exclusion of the wiretap evidence obtained.

Thus, the relevant question is simply whether the delays were satisfactorily explained. Given the facts of this case, it is difficult to see how the Government can even claim the existence of a satisfactory explanation for the delays. Accordingly, suppression of all the MP-15, MP-16 and MP-17 tapes is mandated. United States v. Gigante, supra; United States v. Ricco, supra.

POINT IV

THE DISTRICT COURT JUDGE SHOULD
HAVE PERMITTED THE PLAYING OF
THE ENTIRE TAPE OF THOSE TAPES
SELECTED TO BE PLAYED BY THE
UNITED STATES.

Three of the named defendants in 74 CR 142 are appealing from the various rulings in this case and of the three only defendant McGrath proceeded to trial on May 11, 1977. This was the result of a severance which was granted upon counsel for McGrath being assigned on November 16, 1976.

Until the aforementioned date co-counsel Mr. Scaccia represented Messrs. Masciarelli and McGrath and on November 15, 1976 Mr. Scaccia advised the Court that the defendant McGrath indicated to him that he was not a bookmaker and did not have a portion of the profits of any bookmaking operation and did not realize any profits therefrom (App. pp. 163-164).

Upon proceeding to trial the subject of minimization was properly raised and tested and over objection, the United States was permitted to be selective as to what portions of the tapes would be played. (Objection; App. p. 165; renewed App. pp. 167, 169). The United States was permitted to play a portion of Exhibit 14-C, one of two (App. p. 165).

"ASSISTANT U.S. ATTORNEY: I'd like to play the first portion of that and then skip to a later section of it and play that. It will be in two separate sections.
THE COURT: All right.

MR. SHANAHAN: I'd like to object to the selectivity by counsel.

ASSISTANT U.S. ATTORNEY: Defense counsel wants me to play the whole tape.

THE COURT: Is that what you want, Mr. Shanahan?

MR. SHANAHAN: I'd rather have you rule on the objection.

THE COURT: Well, the objection is, you are objecting to Mr. Chalenski's selectivity on a particular tape.

MR. SHANAHAN: Yes, that is right.

THE COURT: The only two other alternatives we have is not to play the tapes at all or to play the whole thing.

MR. SHANAHAN: I would regard (request) the former.

THE COURT: Overruled.

The United States Attorney started with page 123 (App. p. 165) and continued to page 149; then moved to play and was permitted to play a composite tape of all different days (App. p. 169). The Court permitted the United States to take these out of context in order to direct the jury's attention toward the defendant. Certainly, there was no immediate right to cross examination. In fact, the right of cross examination was effectively denied; there was no requirement (nor was the opportunity suggested by the Court) that the defendant go forward with any type of direct proof. This situation is extremely significant in view of the representations made to the Court at the time counsel was assigned to represent McGrath:

" . . . McGrath indicated that he McGrath, was not a bookmaker, and did not have a portion of the profits therefrom. . ."

The calls should not have been isolated nor taken out of

context but rather in the sound discretion of the Court the sequence from page 123 through 250 should have been played. In fact, page 1 through 250 should have been played (Exhibit 14-C a tape) in view of the fact that the District Court Judge did not know the contents of pages 1-122 and 150-240.

Further the Trial Judge ruled (App. p. 165) that "we could not play the whole thing".

The Court has the discretion of balancing the relevance of testimony against prejudice. Since there is no indication that he read the omitted pages (he ruled that the entire tape would not be played) he abused his discretion in permitting the selectivity on the part of the United States Attorney. United States v. Albergo, 539 F.2d 860, cert. denied, 429 U.S. 1000. How can we conclude that hearing the sequence of one days testimony is a waste of time or needless presentation of cumulative evidence (United States v. Robinson, 544 F.2d 611) if the Court is not acquainted with the content of such transcription? Certainly we are not in that much of a hurry that we could not hear the sequence of the selected tapes. (The U.S. Attorney passes from pp. 14-17; 20-22; 35-38; 49-51; 90-91; 175-177; 225-227; 272; 277; 307; 308; 350-352 and concluding with page 373[App. p. 170]) This procedure continues (see App. p. 172).

Permitting this method of presentation was designed to establish that the defendant McGrath was the principal defendant rather than the bettor coming in out of the cclld to work off his

losses by answering the telephone.

The Court room was set up so that the tapes could be played and the excluded portions of the tapes were as readily available as those portions which were played. Certainly judicial economy can be promoted in ways other than by restricting defense counsel from going forward and playing a tape or tapes selected by the prosecution in their entirety; and it is submitted that time to play them was when the first ruling was sought. Galloway v. United States, 319 U.S. 372, 388-393. The Court should have been guided by the proposition that all parties be given a full and fair opportunity to litigate. Ex Parte Peterson, 253 U.S. 300, 310.

The objection was made to the Court in timely fashion (App. p. 165). Defense counsel requested that the entire tape(s) chosen be played. See United States v. Chiarizio, 525 F.2d at p. 294. Once again this was denied; and since the Court specifically denied to profer the defendant an opportunity to pertinent evidence, the ruling is error and the judgment of conviction should be reversed.

CONCLUSION

The judgment and determinations below should be reversed.

Respectfully submitted,

JAMES P. SHANAHAN
522 University Building
Syracuse, New York 13202
Tel. (315) 422-4106

Attorney for James W. McGrath,
Appellant

CHARLES W. AVERY
133 Genesee Street
Auburn, New York 13021
Tel. (315) 253-0309

Attorney for Jon N. English,
Appellant

DANTE M. SCACCIA
Suite 300 Wilson Building
Syracuse, New York 13202
Tel. (315) 422-4000

Attorney for Raymond D. Masciarelli,
Appellant

Affidavit of Service

Records and Briefs
For State and Federal Courts
Established 1881

313 Montgomery Street
Syracuse, New York 13202
(315) 422-4805

Russell D. Hay/President
Everett J. Rea/General Manager

Spaulding Law Printing

January 25, 1980

Re: **United States of America vs. James W. McGrath, Jon N. English and
Raymond D. Masciarelli**

State of New York)
County of Onondaga ss.:
City of Syracuse)

Everett J. Rea,

Being duly sworn, deposes and says: That he is associated with Spaulding Law
Printing Co. of Syracuse, New York, and is over twenty-one years of age.

That at the request of **James P. Shanahan, Charles W. Avery and Dante M. Scaccia,**

Attorney(s) for **Appellants**

one (1) copy [x] Joint Appendix and two (2) copies [x] Joint Briefs
☒ He personally served ~~three (3)~~ copies of the printed ☐ Record ☐ Brief ☐ Appendix
of the above entitled case addressed to:

**HON. GEORGE H. LOWE
United States Attorney
100 South Clinton Street
Syracuse, New York 13260**

☐ By depositing true copies of the same securely wrapped in a postpaid wrapper in a
Post Office maintained by the United States Government in the City of Syracuse, New York.

☒ By hand delivery **on 1-25-80.**

Everett J. Rea
.....

Everett J. Rea

Sworn to before me this **25th** day of **January, 1980.**

Donald C. Guinn
.....
Notary Public
Commissioner of Deeds

cc: Dante M. Scaccia, Esq.